

**ORIGINAL**

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Before the  
SURFACE TRANSPORTATION BOARD



Ex Parte No. 714

INFORMATION REQUIRED IN NOTICES AND  
PETITIONS CONTAINING INTERCHANGE COMMITMENTS

COMMENTS

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December 18, 2012

Attorney for Samuel J. Nasca

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Samuel J. Nasca,<sup>1/</sup> for and on behalf of United Transportation Union-New York State Legislative Board (UTU-NY), submits these comments in response to the notice of proposed rulemaking (NPR), dated October 29, 2012 (served November 1). 77 Fed. Reg. 66165-69 (Nov. 2, 2012).<sup>2/</sup>

1. Justification. The NPR proposes to adopt revised rules governing purchasers or lessors of rail lines, by means of notices or petitions for exemption, to disclose additional information about the interchange commitments with other carriers, in their filings with the STB. The filing party would certify whether or not a proposed acquisition or operation of a rail line involves a provision or agreement that may limit future interchange with a third-party connecting carrier.

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<sup>1/</sup> New York State Legislative Director for United Transportation Union, with offices at 35 Fuller Road, Albany NY 12205.

<sup>2/</sup> The time for comments was extended to December 18, 2012, by decision dated November 14, 2012 (served November 15).

The NPR would affect exemption notices or exemption petitions otherwise governed by the statutory provisions of 49 U.S.C. 10901 (non-carriers),<sup>3/</sup> 49 U.S.C. 10902 (Class III carriers),<sup>4/</sup> and all carriers (49 U.S.C. 11323-25).<sup>5/</sup> The exemptions relate to line sales or leases. (NPR 1).<sup>6/</sup>

The additional information to be filed would be treated confidential, and kept secret from the public for a minimum 10-year period. (NPR 13).

The justifications advanced for the changes proposed by the NPR cover the most recent 5-year period where the STB has reviewed ten notices or petitions involving interchange commitments. (NPR 4). Of the ten notice/petitions, the NPR claims that in four of those cases third parties filed petitions to revoke the exemptions based on the interchange commitments. (NPR 5).

Examination of the NPR's citations indicates that only eight such notices/petitions proceedings have been processed since the May 2008 establishment of the present interchange commitment

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<sup>3/</sup> 49 CFR 1150.33. Information to be contained in notice-transactions that involve creation of Class III carriers. (NPR 10-11).

<sup>4/</sup> 49 CFR 1150.43. Information to be contained in notice for small line acquisitions. (NPR 11).

<sup>5/</sup> 49 CFR 1180.4. Railroad Acquisition, Control, Merger, Consolidation Project, Trackage Rights, and Lease Procedures. (NPR 11-12).

<sup>6/</sup> The prefatory "Digest" of the NPR refers to "purchaser." (NPR 1). The term "purchase" is found in the caption to 49 U.S.C. 10902.

regulations, and only two were protested.<sup>7/</sup> One, Finance Docket No. 35412, was the subject of a petition to revoke by UTU-NY, the only protestant, the other, Finance Docket Nos. 35410, 35411, 35418, was the subject of a joint UTU/BLET petition to revoke.

All of the eight or ten notices/petitions were the subject of dissent or comment by a single STB member.

2. Interest of UTU-NY. UTU-NY was a participant in Finance Docket No. 35412, Middletown & New Jersey Railroad, LLC- Lease and Operation Exemption-Norfolk Southern Railway Company (M&NJ), mentioned at three places in the NPR. (NPR 4 n.17, n.18; NPR 5, n.20). M&NJ remains pending reconsideration. The primary UTU-NY objection to the notice of exemption was not the interchange commitment, but was occasioned by other factors. It was the STB's initial notice of the M&NJ's August 31, 2010 exemption filing, served September 16, 2010, which raised the matter of an interchange commitment, sua sponte, through the dissent of Vice Chairman Mulvey.<sup>8/</sup> In subsequent pleadings, UTU-NY added the Mulvey interchange concern as one of the grounds for revocation of

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<sup>7/</sup> The 10 citations are docket number listings (NPR 4, n.17); however, three of these are a single consolidated proceeding, such that the 10 might properly be reduced to 8. (Finance Docket Nos. 35410, 35411, 35418). The NPR claim that third-parties sought to revoke the exemption in four cases (NPR 5 & n.20), might properly be reduced to two, Finance Docket Nos. 35410, 35411, 35418, supra, and Finance Docket No. 35412.

<sup>8/</sup> Earlier, on September 10, 2010, UTU-NY filed a motion for access to an undisclosed confidential agreement mentioned by M&NJ in its August 31, 2010 notice of exemption, but without reference to unknown interchange matters. The STB granted discovery on September 16, 2010.

the class exemption in that proceeding.<sup>2/</sup>

UTU-NY is concerned that the statutory provisions of 49 U.S.C. 10902, not be a wide-open substitute for transactions more appropriately instituted under the multiple-carrier provisions of 49 U.S.C. 11323-25. Although employee protection would seemingly be compromised in purely Class III carrier line acquisition and operation under 49 U.S.C. 10902(c), and leases under 49 U.S.C. 11326(c), the statutory standards for transaction approval differ between §10902(c) and §11324(d). In particular, competitive practices play a much more important role under §11323-25, than under §10902(c). Apart from minimum statutory employee protection, rail carrier employees are part of the "public convenience and necessity" or the "public interest," and frequently have an interest in a given transaction, and the outcome of a proceeding.

The provisions of §10902 properly should be limited to Class III purchases as set forth in the caption. The STB should revisit its wide-open interpretation of §10902, which appears to becoming a substitute for §11323-25. Cf. Class Exem. For Acq. Or Oper. Under 49 U.S.C. 10902, 1 S.T.B. 95 (1996); Chicago Rail Link. L.L.C.-Lease & Oper.-Union Pacific RR Co., 2 S.T.B. 534 (1997);

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<sup>2/</sup> As indicated above, there were only two requests for revocation cited in the NPR which indicated an objection to interchange commitments, one being that by UTU-NY in F.D. No. 35412. The other was F.D. Nos. 35410, 35411, 35418 (all served Oct. 6, 2010), protested jointly by UTU/BLET, which also directed attention to the earlier Mulvey position. (FD 35410, UTU/BLET (10/20/10)).

United Transp. Union-Illinois v. Surface Transp., 169 F.3d 474  
(7th Cir. 1999). <sup>10/</sup>

Respectfully submitted,



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<sup>10/</sup> Congress in ICCTA recognized the conflicting features of §10902 and §11323 for Class III carriers, sufficient for the STB to promulgate differing rules. See: H. Rep. 104-422 (Conf.), ICC Termination Act of 1995, 179-80 (Dec. 18, 1995).